

Mediation as an Alternative to Emerging Postsocialist Legal Institutions in Central and Eastern Europe

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I. INTRODUCTION

Public trust and respect for legal institutions is a fundamental component of a successful democracy¹ and vital in any postrevolutionary government. According to Judge Wayne Brazil, this trust and respect can be fostered through high-quality mediation programs that provide disputants with a fair and equitable alternative to litigation and nonfacilitated settlement.² However, mediation also requires this public trust and respect for legal institutions for the process to function effectively as an alternative to litigation. For instance, in the United States mediation has been utilized to relieve court congestion,³ provide alternative services that are less costly and time consuming to parties than traditional litigation,⁴ and to allow for discussion and settlement of a broader range of issues than the legal system

¹ See Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 739 (1999) (positing that the most effective court model is one in which a high-quality court mediation program is staffed by court neutrals) (footnotes omitted).

² See *id.*

³ See Harry T. Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21 WILLAMETTE L. REV. 425, 436 (1985). But see Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 393 (1986) (stating that increased filing fees to cover court costs would be a better solution to court congestion than creating new ways to settle lawsuits before trial).

⁴ See Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 ALTERNATIVES TO HIGH COST LITIG. 158, 170-71 (1997) (noting that in a Center for Public Resources Institute (CPR) survey of 69 large corporations, 71% experienced significant cost savings while 78% had faster results in the resolution of the disputes, and 72% reported savings in executive time); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1984) (observing that mediation is cheaper and faster than adversary processing because it is not constrained by procedural or substantive law). But see STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 162 (2d ed. 1992) (stating that mediation costs should not automatically be compared with litigation costs, but instead mediation should be compared with what is most likely to occur in any given situation, e.g., unassisted negotiation).

can provide through litigation.⁵ The key to understanding mediation here is that it is an alternative forum; parties understand that if mediation fails they can resort to our well-established legal system to settle their disputes based on procedural equality and substantive fairness. While one's ability to pay for high-quality legal services remains an impediment to fully achieving this equality and fairness, overwhelming numbers of Americans believe in the idea of equal justice as the cornerstone of our legal system.⁶

In contrast, the emerging postsocialist legal institutions in central and eastern Europe have neither this base of well-established procedural equality nor substantive fairness in both statutory and common law. In addition, the peoples of central and eastern Europe exhibit high degrees of mistrust towards the people who administer their legal institutions. Given this backdrop of mistrust, is mediation a viable and desirable process in central and eastern Europe? In other words, can this alternative means of dispute resolution function at an effective level without a well-established and procedurally fair legal institution behind it?

This Note will analyze the legal climate that exists in central and eastern Europe today and try to answer this question of whether mediation is a viable process. Part II will discuss the current legal system against the backdrop of socialism, outlining both institutional and societal problems integral to determining whether mediation should be encouraged as an alternative to litigation. Many central and eastern European countries currently have various mediation programs in place—these will be described and analyzed in Part III. Based on the issues addressed in Part II and on the current examples of mediation in this new central and eastern Europe, Part IV will discuss the benefits and disadvantages of mediation in resolving these societal and institutional problems. Specifically, can mediation assist in resolving these problems, or will it impair the transformation from communism to a democracy by diverting attention away from the essential goals of establishing a viable legal system? Part V will determine whether, given the strained relationship between these legal institutions and the

⁵ See DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* § 2.1.5, at 54–55 (1996). Golann notes that although lawyers focus on the legal issues in a case, parties may be unable to settle because of psychological factors, distress over their soured relationship with the opposing party, or simply miscommunication because of conflicting bargaining styles. *See id.*

⁶ See Steven Keeva, *Demanding More Justice: Whether Americans Get What They Want from the Legal System Depends on Its Ability to Stretch Limited Resources*, A.B.A. J., Aug. 1994, at 46, 47 (citing an American Bar Association (ABA) Journal-Gallup poll that found that 96% of Americans believe in equal justice, while only 14% felt that the legal system actually provided that type of justice).

people, mediation programs should be implemented through the legal system or through private entities. Finally, Part VI will conclude that mediation is a viable and desirable process that can educate parties about responsible decisionmaking and ease the painful transition from communism to democracy.

II. THE CURRENT LEGAL SYSTEM AGAINST THE BACKDROP OF SOCIALISM

The Berlin Wall fell in 1989, heralding abrupt and often violent revolutions throughout central and eastern Europe.⁷ As new governments established themselves and their ideals, the central and eastern European countries began the slow and cumbersome transition from state run legal institutions to institutions based on a particular blend of democratic principles. As their governments changed, the people of central and eastern Europe began to raise political and theoretical questions regarding the formulation of a new set of social values in these emerging democracies.⁸ Unfortunately, in establishing new governments after the overthrow of communism, most people in central and eastern Europe have not understood that “they had to vote not only against communism, but more precisely for other politicians, and for other ideologies.”⁹ This ideological

⁷ For a firsthand account of the events surrounding these revolutions in central and eastern Europe, see generally MORT ROSENBLUM ET AL., *MOMENTS OF REVOLUTION: EASTERN EUROPE* (1990).

⁸ See Richard Starets, *Hungary: Building the Ethics of Democracy*, *INSIGHTS ON GLOBAL ETHICS*, Mar. 1993, at 1, 1 (positing that Hungary must address issues regarding these new social values as well as procedural difficulties of establishing a new government, economic problems in the transformation to a free-market economy, and the critical dangers of a new nationalism).

⁹ *Id.* at 2 (discussing Hungarian voters in the elections of 1990). Hungarian parliamentary member Peter Hack describes this situation as “an ethical vacuum” in which “everything that was claimed bad by communism became good.” *Id.* In Poland, voters who originally just wanted the Communists out of power are increasingly unsure about the current amorphous parties because rather than focusing on voters’ economic concerns, the parties rely on political ideology that the electorate neither understands nor embraces. See Jane L. Curry, *Which Way is Right?*, *TRANSITIONS*, Oct. 1997, at 74, 74–75.

In contrast, the Czech and Slovak dissidents who inaugurated the “velvet revolution” were clear in their desire to establish a “new order [that] would found its moral credentials on the decency of the transformation.” Ronald F. Lipp, *After the Revolution*, 1 *LIBERTY* 25, ¶ 9 (July 1998) <<http://ella.sirs.com>>. Led by current President Vaclav Havel, these dissidents wanted to “show the world by example what a

vacuum demonstrates that transforming a legal system from one that addresses state concerns to one based on democratic ideals is simply not enough to transform a society, for the people also must be transformed. This Part deals with the following two issues: that of institutional change and that of societal change.

A. Legal Institutions: From Socialism to Democracy

Under socialism, "the state was the expression of the dictatorship of the proletariat" and "could hardly act contrary to its own interests."¹⁰ Independent judicial review of state action was nonexistent; the system simply could not legally accommodate differences of opinion between the state and the people. Technically speaking, the state did permit nominal judicial review of state action; however, judicial allegiance to the interests and goals of the state resulted in a system that was patently corrupt. According to the Justice Sandra Day O'Connor, "[g]overnment officials would telephone judges to request particular rulings in cases of interest to the Party."¹¹ This practice became so widespread that the judiciary essentially became the lackey of the state, and instead of dispensing justice, provided the state with a farcical arena for the legitimization of its policies.

Given this historical system of subservience to the needs and goals of the state, the central and eastern European judiciaries are currently engaged in a painful transformation. Essentially, they must evaluate ingrained and accepted modes of practice at all levels, and evolve from their traditional role as governmental "yes men" to architects who must play an integral

humane and morally uplifted society might be." *Id.* (paraphrasing President Vaclav Havel). Unfortunately, current Czech citizens now view democracy and capitalism as having the "same sort of essential corruption that existed under the old regime." *Id.* ¶ 16.

¹⁰ Justice Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 573 (1993). The authors note that many socialists considered judicial review to be a primary example of bourgeois attempts to invalidate socially beneficial legislation solely to benefit their own economic situations. *See id.* at 573-74.

¹¹ Hon. Sandra Day O'Connor, A Tribute to Professor Immel, Address at the Ceeli Award Ceremony and Luncheon, ABA Annual Meeting, in 42 ST. LOUIS U. L.J. 715, 717-18 (1998). This judicial-executive alliance continues under the current systems as well. As Associate Justice O'Connor notes, "[i]n the civil law tradition, the courts fall under the umbrella of the executive branch ministry of justice, which can easily lead to some of the former abuses." *Id.* at 718.

role in determining the constitutionality of state initiatives. This transition is understandably difficult. According to a Hungarian observer, the current judiciary often "appears unfit to make the necessary adjustments in the form of creative judge made-law [sic]," and "[t]he public feels that judges avoid decision making."¹² Another difficulty is that most judges have occupied their positions under socialism. For example, before the Czech-Slovak divorce in 1993,¹³ the situation there was exacerbated by "[a]n acute shortage of experienced judges who [were] not compromised by their judicial records under the communist regime"¹⁴ Similarly, the Polish legislature recently passed a statute "disciplin[ing] judges who made politically influenced rulings during the Communist era. . . ."¹⁵

In addition to this problem of a compromised and often recalcitrant judiciary, many central and eastern European courts are constitutionally barred from independently deciding whether to grant certiorari. For example, "[t]he right to initiate constitutional review [in Romania] is reserved for a few political figures who usually belong to the same majority which passed the challenged statute."¹⁶ Similarly, the Bulgarian

¹² Andras Sajó, *The Judiciary in Contemporary Society: Hungary*, 25 CASE W. RES. J. INT'L L. 293, 300 (1993) (noting that although Poland's Solidarity Movement has been able to increase the judicial ranks with legal professionals who had not worked under the Communist regime, other countries in central and eastern Europe must still rely on the judiciary in place under communism).

¹³ See *New Slovak Government Hopes to Rejoin EU Fast-Track*, Agence France-Presse, Oct. 30, 1998, available in 1998 WL 16629490. For a discussion of this "velvet divorce," see Giles Milton, *How the Other Half is Living . . .*, Mail on Sunday, Nov. 1, 1998, available in 1998 WL 14345087.

¹⁴ Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 539 (1991). "The Czech republic alone is said to be short at least 330 judges. One hundred were dismissed after November 1989, and another 120 left voluntarily, with only 115 new judges appointed to replace them." *Id.* at 539 n.72 (citing JAN OBRMAN, REHABILITATING POLITICAL VICTIMS: REPORT ON EASTERN EUROPE 5, 7 (1990)).

¹⁵ Peggy Simpson, *Law Seeks Purge of Poland's Judges*, NAT'L L.J., Mar. 2, 1998, at A12 (stating that President Aleksander Kwasniewski has petitioned the Polish Supreme Court to rule on the constitutionality of the statute).

¹⁶ Rett R. Ludwikowski, *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, 3 CARDOZO J. INT'L & COMP. L. 73, 123 (1995) [hereinafter Ludwikowski, *Fundamental Constitutional Rights*]. Ludwikowski asserts that the selection of the form of constitutional review has become "one of the most controversial issues in the constitutional debate across East-Central Europe," with most countries rejecting the American approach in favor of those of Austria, Germany, or France. *Id.* at 160-61. However, in a later article, Ludwikowski states that the end

Constitutional Court may only exercise its reviewing power "if no less than one-fifth of the national representatives, the president, the Council of Ministers, the Supreme Court of Appeals, the Supreme Administrative Court or the Prosecutor General initiate it."¹⁷ These qualifications on the judiciary's ability to grant certiorari understandably result in mistrust between the people and the judiciary because only those statutes the executives allow to be reviewed will be reviewed.

Given these restrictions, current legal systems of central and eastern Europe have both institutional and personnel problems with regard to their ability to embrace fully democratic ideals of procedural equality and substantive fairness. These problems understandably have resulted in legal institutions that have neither the trust of the masses nor the necessary support from other branches of government. Some of these issues have procedural solutions. For example, judicial review limitations may be overcome through constitutional amendments. Similarly, concentrated efforts in legal and judicial education can train a new and uncompromised judiciary. In contrast, the question of trust between the people and the judiciary has no such procedural or easily definable solution except perhaps time and experience under the new system. Assuming that this mistrust is deeply felt and may not be ameliorated in the near future, it may be a significant barrier to societal and political transformation.

B. *Complete Societal Transformation from Communism to Democracy: Is This Possible?*

Just as the judiciary currently inspires mistrust, political leaders of central and eastern Europe are viewed with suspicion. This attitude towards the government has its roots in the population's experiences under communism. For example, two well-known expressions in communist Czechoslovakia are as follows: "[t]hey pretend to pay us, we pretend to work"; and "[h]e who does not steal from the State, steals from his family."¹⁸ Also demonstrating this profound mistrust, during a Slovakian presidential campaign in 1998, the opponent to President Merciar began a contest entitled "Bomb 98" to see if constituents could guess which election

result of constitution making in central and eastern Europe has been the adoption of an amalgam of various constitutional models. See Rett R. Ludwikowski, "Mixed" Constitutions—Product of an East-Central European Constitutional Melting Pot, 16 B.U. INT'L L.J. 1, 2 (1998).

¹⁷ Ludwikowski, *Fundamental Constitutional Rights*, *supra* note 16, at 107.

¹⁸ Lipp, *supra* note 9, ¶ 8.

tricks the incumbent would employ in the last forty-eight hours of the election.¹⁹ And in Romania, Foreign Minister Adrian Severin "was forced to resign after failing to substantiate allegations that senior politicians were foreign agents" ²⁰

Although history provides many reasons for this widespread mistrust (i.e., many current political leaders have been compromised by past records under communism),²¹ human psychology also provides a rationale. According to biologist Mary Clark, mistrust of current political leaders and the judiciary is typical behavior for people in postrevolution countries. She asserts that although political systems can be replaced, the ways in which people internalize and understand justice and fairness are not as easily or quickly changed.²² Essentially, the human brain cannot possibly store every

¹⁹ See *id.*

²⁰ Anatol Lieven, *Romania Mired in Feuds: Party Rivalries Have Raised Doubts About Prospects for Reforms*, FIN. TIMES (London), Jan. 27, 1998, at 31.

²¹ For example, in Czechoslovakia, dissidents included "more than 500,000 Communist Party members [who] had been expelled from the party . . . following the 1968 Soviet-led invasion of Czechoslovakia that crushed the Prague Spring reform movement." Jiri Pehe, *Reshaping Dissident Ideals for Post-Communist Times*, TRANSITION, Feb. 21, 1997, at 6, 6. These dissidents objected to Soviet-run communism rather than communism itself. After the velvet revolution, "[d]iffering views on how to deal with former collaborators and people tainted by political activities under the former regime demarcated the main dividing line within the former dissident community." *Id.* at 7. The failure of the leadership to acknowledge the past political activities of current political leaders did much to alienate the public, who understandably felt that such leaders could not be trusted.

In Poland, politicians split on the issue of whether the country should screen people in important government posts to learn whether they were communist secret police collaborators. See *id.* at 7-8.

In contrast to the Polish and Czech situations, communists in Bulgaria and Romania "simply ousted their top leaders, changed their parties' names, and claimed to be democrats." Jane L. Curry, *Communists Turned Social Democrats*, TRANSITIONS, Oct. 1997, at 78, 79. This transition was accomplished so smoothly in Romania that the country in 1992 was still unsure if the executions of Nicolae and Elena Ceausecu in 1989 and the subsequent fall of that government were a coup d'état by rival communists or a true revolution by the people. See *Romania Seems Unwilling to Confront Realities of '89*, STAR TRIB. (Minneapolis-St. Paul), Dec. 20, 1992, at 12A. Of course, this unease dates back to the Bolshevik Revolution of 1917; while communists believed that this was a true revolution by the people, Western scholarship has "treated the October seizure of power as a Bolshevik coup rather than a popular revolution. . . ." SHEILA FITZPATRICK, *THE RUSSIAN REVOLUTION: 1917-1932*, at 4 (1982).

²² See Mary E. Clark, *Symptoms of Cultural Pathologies: A Hypothesis*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 43,

image it receives throughout one's lifetime. Those images and impressions it *does* choose to receive are selected to a large extent based on our culture.²³ Clark defines these images and impressions as one's "worldview," and maintains that "changing the worldview of an entire culture means changing all the expected patterns of daily personal interaction and all the institutions that make up social life."²⁴ Given the difficulties inherent in questioning every facet of one's life, this seemingly extraordinary mental task is not possible for everyone. Indeed, Clark posits that "not *all* worldviews are equally adaptive."²⁵ For these reasons, political revolutions that seek to radically change the way people interact with one another seldom bring about lasting social change.²⁶

Hungarian legal scholar Csaba Varga echoes Clark's assertion regarding the difficulties of social change by positing that no one "socialized according to the Soviet pattern can step over Marxism by a simple pronouncement or decision."²⁷ These observations are especially important in the context of the prerevolutionary central and eastern Europe, because information regarding the noncommunist world was restricted and replaced with propaganda and misinformation.²⁸ In addition to prohibiting any foreign travel to the West, travel within these countries required substantial governmental approval.²⁹ As a result, central and eastern

52-53 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993) (positing that comprehensive social change requires participation in that change at every level through the only mechanism that will force our brains to accept new ideas: face-to-face conversation).

²³ See *id.* at 44-45.

²⁴ *Id.* at 45.

²⁵ *Id.*

²⁶ See *id.* at 52.

²⁷ Csaba Varga, *Transformation to Rule of Law from No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe*, 8 CONN. J. INT'L L. 487, 504 (1993) (positing that preconceptions formulated under Marxism must be reevaluated at national and individual levels for the survival of postsocialist systems).

²⁸ See ROLAND N. STROMBERG, *EUROPE IN THE TWENTIETH CENTURY* 383 (2d ed. 1988).

²⁹ See Stanislaw Frankowski, *The Procuracy and the Regular Courts as the Palladium of Individual Rights and Liberties—The Case of Poland*, 61 TUL. L. REV. 1307, 1313-14 (1987) (discussing conspicuous absence of "freedom of movement and travel, including the right to choose one's place of residence"); Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 719-20 (noting travel bans in Hungary demean the human spirit).

Europeans' experiences and life impressions were even more uniform than the worldview of a society in which information is freely available and travel restrictions are nonexistent.

Due to this difficulty of viewing the world free from cultural limitations that were essential to one's survival, postrevolutionary legal systems must fit somehow within the prerevolution pattern of living. In the context of the Stalinist re-creation of Soviet society, a Muscovite observer in the 1930s noted that "with the individual and the nation jumping, also their past will leap. History won't be left on the other side."³⁰ And in the contemporary context of the Hungarian transformation from Goulash communism to a parliamentary system, Hungarian legal scholar Csaba Varga asserts that because social institutions have meaning only in their relationship with society, the national past and tradition must form the foundation and context for emerging legal institutions.³¹ Essentially, the ways in which people understand justice and fairness in a democratic context must somehow be linked to how they understood those concepts under communism.

In summary, the judiciary is tainted by past association with communism and current restricted powers of review. As a result, current legal institutions in central and eastern European countries do not embody the democratic ideals of procedural equality and substantive fairness necessary for a truly just system and are mistrusted by the people. Yet, as a Hungarian observer has written, "the success of any legal renewal . . . can be guaranteed only by full social and political support."³² In other words, although institutional failings may be ameliorated through constitutional amendments and judicial education, changing the way people view social institutions is the hardest part in achieving lasting social change.³³ Considering that the basis of effective mediation is rooted in the presence of a fair and just legal system, it becomes apparent that this prerequisite of full social and political support is particularly relevant to our inquiry regarding the role of mediation in the transformation from socialism to democracy.

³⁰ Varga, *supra* note 27, at 498 n.19 (citing ERVIN SINKO, EGY REGENYI REGENE: MOSZKVAI NAPLOJEGYZETEK (1935-1937) [THE NOVEL OF A NOVEL: A MOSCOW DIARY (1935-1937)], at 320 (Istvan Bosnyak ed., 1985)).

³¹ *See id.* at 498.

³² *Id.* at 494.

³³ *See* Clark, *supra* note 22, at 52.

III. CURRENT MEDIATION PRACTICES IN CENTRAL AND EASTERN EUROPE

Given this deeply felt mistrust and the subsequent precarious situation of legal institutions in central and eastern Europe, an essential question is whether an established and fully functional mediation program can alleviate either problem. Prior to answering that question, it is necessary to examine whether current mediation efforts in central and eastern Europe are helping to alleviate these problems. This Part gives an overview of these efforts and serves to highlight which uses of mediation central and eastern European governments believe to be valuable in their societies.

Although not widely practiced, most central and eastern European countries employ some form of mediation. For purposes of this Note, and to reach some conclusion about the viability of mediation to resolve internal disputes that might otherwise be litigated, mediation studied here will be those processes used by the central and eastern European countries themselves, rather than international mediation of their disputes by foreign neutrals.

Most mediation in central and eastern Europe is organized and implemented by the executive branch of government. For example, mediation in Bulgaria currently consists of the state selecting public agents to mediate disputes between it and other countries,³⁴ and the state selecting private companies to mediate the privatization of publicly owned corporations.³⁵ In Romania, mediation has been used by many state actors,

³⁴ See *Cabinet to Discuss Credit Agreement with Japan*, PARI Daily, Oct. 5, 1998, available in 1998 WL 9451980 (stating that "the cabinet will select procedural mediators representing the country regarding the credit agreement with the Japanese Exim Bank, as well as the agreements on rescheduling Bulgaria's debts to Japanese banks"); see also *Bulgaria, Macedonia Can Settle Language Argument Without Help*, July 5, 1998, PARI Daily, available in 1998 WL 9450448 (rejecting German efforts to mediate their dispute with Macedonia, and stating that "[a]s a country of self-respect Bulgaria has the powers and opportunities to solve the problem without mediation . . ."); *Talks on Russian Gas Supplies to Bulgaria Start*, Interfax (Moscow), Mar. 20, 1998, available in 1998 WL 9503905 (stating that mediation by businessmen for Bulgaria did not succeed in reaching agreement between Russia and Bulgaria).

³⁵ See, e.g., *Buyer of Kremikovtsi Steel Plant to Be Chosen by the End of 1998*, New Europe On-Line, Aug. 7, 1998, available in 1998 WL 24016376; see also Iva Ivanova, *Vitosha Works Goes Private by End-June: Raiffeisen Investment and Atkins Currently Consulting Sales of Gorubso, Dyuni, Roussalka*, PARI Daily, Apr. 26, 1998, available in 1998 WL 9449787.

including the following: by the President in disputes arising among Romanian political parties;³⁶ by state agencies in labor-management disputes;³⁷ and by agencies as a tool to calm violent local ethnic conflicts.³⁸ In Hungary, the newly formed National Service for the Mediation and Arbitration of Labor employs ninety-eight mediators;³⁹ however, no instances of mediation have yet been reported.

In contrast, neither the Czech nor Slovak republics have any government-sponsored mediation, although the Czech Republic is currently considering a victim-offender mediation program through a probation and mediation service.⁴⁰ Poland also lacks any government-sponsored mediation, although the Archbishop of the Polish Catholic Church has successfully mediated an economic labor strike.⁴¹

In addition to government mediation, many individuals and organizations involved in dispute resolution have begun teaching mediation techniques in central and eastern Europe. For example, in Brasov,

³⁶ See *Romanian Leaders, Rivals Begin Talks*, DALLAS MORNING NEWS, Dec. 18, 1990, at 15A (stating that President Ion Iliescu mediates between leaders of the National Liberal Party and Prime Minister Petre Roman); *Romanian Opposition Party "Breaks Links" with President*, New Europe On-Line, Sept. 22, 1998, available in 1998 WL 24017396 (noting Social Democrats accuse President Emil Constantinescu of "failure to fulfill his duty of 'mediator' among social and political forces").

³⁷ See Richard L. Holman, *Strike Halts Trains in Romania*, WALL ST. J., June 15, 1993, at A14 (explaining that the Transport Ministry mediated economic strike of 32,000 workers).

³⁸ See *Romanian Leaders Meet Opponents, Discuss Coalition*, L.A. TIMES, Dec. 18, 1990, at A14. Partners for Democratic Change, an American mediation organization, also has helped facilitate meetings between local governments and the Roma (Gypsies), successfully settling such disparate conflicts as police discrimination and the inability of 70 Roma families to pay their rent and utility bills to the government. See Kinga Göncz & Sándor Geskó, *Ethnic Minorities in Hungary: Democracy and Conflict Resolution*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1997, at 28, 34-36.

³⁹ See Philip Dine, *D.C. Gets Taste of St. Louis Pride*, ST. LOUIS POST-DISPATCH, Sept. 5, 1997, at 3C; see also Cory R. Fine, *Starting from Scratch: ADR Helps Resolve Labor Conflicts in the New Hungary*, DISP. RESOL. J., Jan. 1995, at 74, 76 (noting that mediation would require the parties to submit written proposals to the mediator and would occur only after conciliation or unassisted negotiations between the parties).

⁴⁰ See Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 82 (1998) (noting that the Czech service is modeled after the Probation Assistance Association in Austria).

⁴¹ See *Polish Auto Strike*, ASIAN WALL ST. J., Sept. 16, 1992, at 5 (noting that mediation of representatives of Archbishop Damian Zimon successfully resolved the automobile plant strike).

Romania, a private U.S. mediator recently taught classes in mediation techniques.⁴² Similarly, in the Czech Republic private mediators and educators currently educate selected principals and teachers about conflict resolution in the schools.⁴³ In Poland, mediators from Canada, the United States, and New Zealand have gathered to discuss family law mediation,⁴⁴ while a Baltimore religious organization has visited to help implement student mediation.⁴⁵ Finally, Partners for Democratic Change, a private nonprofit corporation in the United States, has established university-based conflict resolution centers in Poland, Hungary, Czechoslovakia, and Bulgaria.⁴⁶ These centers offer courses in mediation in universities in Budapest, Warsaw, Prague, and Bratislava.⁴⁷

In short, countries in central and eastern Europe are currently employing mediation through the executive branches to resolve such conflicts as labor disputes, ethnic violence, political infighting, and privatization. International groups are also teaching conflict resolution procedures in selected universities throughout central and eastern Europe. At this point, mediation has not developed its full potential for resolving conflicts between individuals, although educational efforts are attempting to alleviate this situation. For this reason, the question remains as to whether mediation can help achieve lasting social change by giving people the tools

⁴² See Chris Olson, *Mediators Help Settle Disputes, Check the Alternatives: Mediation Services in the Midlands*, OMAHA WORLD-HERALD, Aug. 13, 1995, at 1F.

⁴³ See Jon Glass, *Foreign Educators Get Lessons in Democracy*, VIRGINIAN-PILOT & LEDGER STAR, Feb. 18, 1995, at B1 (noting that organizer Jitka Jilemicka believes that educators need to "teach pupils for future life and communicating and talking about feelings and what you do with your feelings, like anger").

⁴⁴ See *Reporters' Notebook*, BUFFALO NEWS, Nov. 25, 1997, at B4 (stating that 11 members of the Citizen Ambassador Mediation Delegation met in Krakow to discuss family law issues in Poland).

⁴⁵ See Adam Katz-Stone, *We All Have to Find Our Own Way: Paul Kaplan of the Hannah More Center Believes He Strengthens Interfaith Communication in Church*, BALTIMORE JEWISH TIMES, Apr. 18, 1997, at 30 (noting that Paul Kaplan "visited Poland to help the Polish Psychological Association introduce student mediation programs in that country").

⁴⁶ See Eric Brazil, *S.F.'s Great Peacemaker Takes on E. Europe Community Boards: Founder Teaches New Democracies How to Compromise*, S.F. EXAMINER, Jan. 27, 1992, at B3 (quoting founder Raymond Shonholtz, who explained that under communism, "those who were not in the social scheme were enemies, and those who had a conflict with the state were social deviates . . . Democracy requires fundamentally different attitudes, which require compromise in conflict situations. That's a big psychological adjustment.").

⁴⁷ See *id.*

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they need to successfully manage their own disputes. A related but distinct question is whether mediation will operate as an asset or a hindrance in the emerging postsocialist legal institutions.

IV. BENEFITS AND DISADVANTAGES OF MEDIATION IN CENTRAL AND EASTERN EUROPE

Mediation has been implemented in the United States to relieve court congestion and to decrease costs to the parties in terms of time and money.⁴⁸ Although these are important goals in central and eastern European countries as well, the problems identified in previous Parts concerning the lack of an adequately trained and unbiased judiciary necessitate the elevation of other distinct goals for mediation. According to one scholar, mediation programs in central and eastern Europe should not attempt to emulate American mediation, but should “emphasiz[e] the importance of needs assessment and empowerment of parties in creating social change.”⁴⁹

Essentially, issues of fairness and equality in a legal system are more critical than are those of case management and time to disposition. This Part analyzes these issues and their possible solutions in central and eastern Europe, including the critical issue of whether mediation will siphon off important cases that should be resolved in public by the judicial system. In addition, mediation is analyzed as a step towards self-government and democracy.

A. Fairness and Equality Issues Within Mediation Generally

In his seminal article *Against Settlement*, Professor Fiss outlined several fairness and equality problems in the settlement of individual cases outside of the protection of the judicial process.⁵⁰ Specifically, Fiss noted that the stronger party may coerce settlement, that either party may lack the requisite authority to settle, and finally, that the lack of a trial makes subsequent judicial involvement problematic.⁵¹ While these concerns are valid, mediation does not automatically mean the subversion of the ideals of

⁴⁸ See *supra* notes 2–4 and accompanying text.

⁴⁹ Ilano Shapiro, *Beyond Modernization: Conflict Resolution in Central and Eastern Europe*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1997, at 14, 24.

⁵⁰ See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1072 (1984) (arguing that settlement may preclude justice to the parties and future disputants).

⁵¹ See *id.* at 1075.

equality and fairness. Instead, because mediation is premised upon consensus, it gives individual parties freedom to creatively resolve their differences and the complete power to accept or decline a proposed settlement.⁵² Given equal understanding of the alternatives, this ability to accept or decline puts the parties on an equal footing in the decisionmaking process. Inclusion of counsel in the mediation session further diminishes any power imbalance, because each lawyer will advocate for her client's best interests in the dispute.⁵³ In addition, the mediator can refuse to continue with the process if a power imbalance threatens to coerce either party into settlement.

Regarding Fiss's concern that parties may not have ultimate authority to settle the dispute, the mediator can either refuse to begin the sessions until all parties have settlement authority or schedule additional sessions to allow a party to communicate with those individuals needed to finalize any settlement. Lastly, while private settlement of a dispute may make judicial involvement at a later date more difficult than involvement at the appellate level, suggesting that all disputes necessarily should be litigated is nonsensical.⁵⁴ In other words, simply because a dispute enters the judicial system is insufficient reason to allow that system to preclude parties from settling simply because the case may ultimately re-enter that system.

*B. Mediation Can Serve as an Alternative Process to Avoid
Current Systemic Problems in Legal Systems of Central and
Eastern Europe*

In central and eastern Europe these issues of fairness and equality represent two significant drawbacks to litigation in the postsocialist legal institutions. First, judges use formal and mechanical approaches based on "seemingly arcane civil law principles rather than the merits" of a particular dispute.⁵⁵ As discussed previously, the current judiciary was

⁵² See Memorandum from Josh Stulberg, Professor of Law, The Ohio State University College of Law 1 (Aug. 27, 1998) (arguing against Fiss's position in *Against Settlement*) (on file with author).

⁵³ See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1371 (1995) (advocating inclusion of lawyers in mediation sessions in order to present logical and well-reasoned accounts of a dispute).

⁵⁴ See Stulberg, *supra* note 52, at 1.

⁵⁵ Ethan S. Burger et al., *Resolving Commercial Disputes in Russia and Ukraine: Will Mediation Be a Viable Option?*, 16 ALTERNATIVES TO HIGH COST LITIG. 67, 67

trained under a strict party-centered system and naturally has difficulty learning how to fashion opinions based on abstract principles of justice and equality. Second, successful plaintiffs have considerable difficulty in enforcing favorable rulings given difficulties in "locating defendant's assets, deficiencies in applicable legislation, and a shortage of skilled and motivated court personnel."⁵⁶ These procedural difficulties stem from the disarray inherent in any system designed primarily for the benefit of the state instead of the benefit of the individual. In short, these procedural impediments result in a system in which judicial holdings often fail to adequately address the specific dispute in litigation and damage awards are theoretically valid but practically impossible to enforce.

Given these systemic problems in postsocialist legal systems, an effective mediation program may satisfy the needs of parties desirous of an efficient process facilitated by a neutral third party. Mediation is relatively inexpensive and essentially needs only the mediator to initiate, conduct, and conclude the process. Because of this, judicial and court staff inadequacies become largely irrelevant to the process. This contrast could encourage parties to fashion their own creative solutions to disputes by concentrating on the particular merits of that dispute so as to avoid the over generalization and reliance on arcane and often irrelevant statutes used by the judiciary.

In addition to overcoming judicial and legislative inadequacies, mediation permits discussion and resolution of a broader range of issues than any legal system can provide.⁵⁷ For example, legal systems require that only legal causes of action be argued. In contrast, mediation allows the parties to discuss the emotional impact of a dispute and often to include apologies in the settlement agreement.⁵⁸ Furthermore, in mediation, parties can negotiate over logistics of any payment agreed upon in a settlement agreement. Because the parties can bargain for acceptable schedules, including time, place, method of payment, and amount of each payment,

(1998) (advocating the use of mediation for commercial disputes involving Western investors and central and eastern Europeans).

⁵⁶ *Id.* at 68.

⁵⁷ See GOLANN, *supra* note 5, § 2.1.5, at 54-56.

⁵⁸ See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 344 (1999).

compliance with these agreements is generally as high or higher than compliance with court-ordered awards.⁵⁹

Finally, the difficulties involved in training mediators, however extensive, do not even approach the inherent difficulties of re-educating the judiciary. Even if cost were not a factor,⁶⁰ this re-education requires a significant amount of time before there is widespread acceptance among the judiciary. In contrast, mediation training can produce qualified neutrals ready to help parties resolve disputes within weeks of initiating training sessions. This crucial decrease in time allows court administrators to methodically re-educate the judiciary while simultaneously offering parties a neutral process that can help them resolve their current disputes.

C. A Carefully Constructed Mediation Program Will Not Necessarily Divert Cases with Possible Value as Important Precedents Away from Litigation

Another problem noted by Fiss in his critique of mediation in general is that mediation subverts the main goals of the judiciary to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes."⁶¹ Common-law systems depend upon well-defined and comprehensive precedents, and, Fiss contends, mediation necessarily precludes this development of important precedents.⁶² This fear would be intensified in countries with embryonic case law and a dearth of such well-defined precedents. According to Varga, this transition period from socialism to democracy is "a historic time for developing standards and making them conventional step by step."⁶³ In other words, this is a time when legal systems desperately need to embrace and decide

⁵⁹ See GOLDBERG ET AL., *supra* note 4, at 155-56 (discussing mediation research in a variety of contexts).

⁶⁰ Western lawyers have volunteered their time and expertise to courts in central and eastern Europe. See Theodore R. Kupferman, *Judicial Independence Implies Judicial Responsibility*, N.Y. L.J., June 27, 1996, at 2 (noting that lawyers traveled to Poland as part of the "American Bar Association's Central & Eastern European Law Initiative (CEELI) to explain our judicial system and meet with and discuss with Polish judges . . . [the adoption of] a Code (similar to the American Bar Association's Model Code and New York's) of Judicial Ethics and foster judicial independence"); see also *supra* note 44 and accompanying text.

⁶¹ Fiss, *supra* note 50, at 1085.

⁶² See *id.*

⁶³ Varga, *supra* note 27, at 492.

fundamental disputes in order to establish the courts as defenders of the democratic values of fairness and equality. The fear articulated by Fiss is that mediation might siphon off these potentially important disputes.

One method for answering this challenge of reserving important cases for litigation lies in careful case selection for mediation at intake. For example, many U.S. state legislatures have passed statutes providing for mandatory mediation of divorce, yet exclude mediation from cases involving critical public policy issues.⁶⁴ Other states rely on legally trained intake officers (or mediators) to sift through cases and offer mediation services only to those whose profiles meet statutory standards.⁶⁵ Yet another method is to provide future funding for mediation programs only if adequate evaluation is done to ensure that the program is following requisite guidelines for case selection.⁶⁶ Evaluation could take the form of a control group study or analysis of exit surveys asking qualitative questions of both participants and the mediator and could be undertaken by either a mediator or an outside social scientist.⁶⁷

Using some or all of these methods of case selection, central and eastern European courts could use their discretion to refer cases to mediation. This discretionary power would allow courts to flag cases that were important to the development of their case law and exclude those from any mediation program. Ability to wield this power would mean that the courts had a measure of control over any mediation process and might mandate that a program be annexed by the legal system into something similar to our court mediation programs. However, given the possible judicial bias discussed previously in Part II.A., significant problems arising from possible judicial bias might arise should the courts be given exclusive control over the process. In order to alleviate this tendency towards bias, the parliaments of central and eastern Europe could provide appropriate statutory guidelines regarding case selection.

⁶⁴ See GOLDBERG ET AL., *supra* note 4, at 9 (stating that legislatures enacted these types of control mechanisms to ensure fairness and justice in alternative dispute resolution (ADR) processes).

⁶⁵ See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY AND PRACTICE* § 6:03, at 3 (2d ed. 1992).

⁶⁶ See GOLDBERG ET AL., *supra* note 4, at 9.

⁶⁷ See DAVID A. DOYLE, *COURT OF APPEALS FOR FRANKLIN COUNTY, DESIGNING, IMPLEMENTING AND MAINTAINING AN APPELLATE MEDIATION PROGRAM* 8-9 (1999) (on file with author).

D. *Mediation As a Means of Facilitating and Encouraging Democracy*

In addition to the benefits a well-managed mediation program can bring to an emerging legal system that is fraught with both corruption and apathy, mediation has the potential to encourage and educate participants in the value of responsible decisionmaking. As one mediator noted while talking with Russian dignitaries interested in establishing mediation centers, learning mediation techniques is "taking 'the first step toward democracy When you are resolving disputes, you are governing yourself.'"⁶⁸

For countries under socialism, this idea that parties can resolve their own disputes is both exhilarating and frightening. For example, central and eastern Europe has always been a hotbed of ethnic conflict, with ethnic hatreds dating back more than 2000 years. Currently, ethnic conflict has "displaced the transition from a planned to a market economy as the central stumbling block in the making of Eastern European constitutions."⁶⁹ In addition, as described earlier, central and eastern Europeans have lost trust in both their own elected leaders and in a democratic system.⁷⁰ This subpart briefly describes the suppression of these ethnic conflicts and analyzes why current central and eastern European peoples may have difficulty adjusting to the transformation from socialism to democracy. Mediation is then offered as a process for reducing ethnic strife and lessening those difficulties of the political and social transition.

1. *Suppression of Ethnic Conflict in Central and Eastern Europe*

The list of peoples that have conquered various parts of central and eastern Europe is lengthy. It includes the Holy Roman Empire, the Franks, the Austro-Hungarian Empire, the Ottoman Empire, and the Soviet

⁶⁸ *Sacramento Center to Help Russians Implement Mediation Programs*, 7 WORLD ARB. & MEDIATION REP. 130, 130 (1996) (reporting that Russian officials had observed the Sacramento Mediation Center and invited President Tinti to go to Russia later that year to help them establish their own mediation centers in the State of Kaluga) (quoting statement of Sacramento Mediation Center Board President Thomas Tinti).

⁶⁹ Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 567 (1991).

⁷⁰ See generally Part II.B.

Socialist Republic, to name only the larger entities.⁷¹ The resulting influx of peoples created ethnic strife by forcing antagonistic groups to live in close proximity. These empires largely contained and suppressed ethnic conflict, primarily because under these authoritative rules the peoples of central and eastern Europe were granted little freedom to express themselves individually, ethnically, or nationally. It only has been when this authoritative control over society was eliminated that central and eastern Europeans were able to fight amongst each other. Accordingly, with each transition from empire to individual countries, these ethnic conflicts have erupted.

One glaring modern example of this ethnic strife is the turmoil of former Yugoslavia, both the current turmoil and the Balkan crisis that precipitated World War I. In addition, in Bulgaria, President Zhelyu Zhelev warned that "Bulgarian democracy is being challenged by the brute ugliness of nationalism and chauvinism."⁷² In Hungary, Parliament member Peter Hack maintained that the "reversal from the homogeneous and centrally planned communist society has resulted . . . in the upsurge of tensions that plague an individualistic society: racism, crime, and malignant nationalism."⁷³ And in Romania, perhaps the most intolerant of all central and eastern European countries towards the Roma (Gypsies), violent attacks against that group go unpunished and are not condemned by the public.⁷⁴

Given this current meteoric rise in ethnic conflict, the ability of central and eastern Europeans to deal with conflict at all levels is crucial. Unfortunately, due to the strong authoritative control under socialism for the last two generations, individuals in central and eastern Europe are not accustomed to governing their own conduct beyond acquiescing in or protesting governmental control. Acquiescing simply meant keeping silent and agreeing to any governmental plan.⁷⁵ Protesting governmental control

⁷¹ See generally C. WARREN HOLLISTER, *MEDIEVAL EUROPE: A SHORT HISTORY* (5th ed. 1982); see also Zvi Gitelman, *The Nationalities*, in *DEVELOPMENTS IN SOVIET POLITICS* 137, 150-51 (Stephen White et al. eds., 1990) (providing an analysis of the Soviet system that is readily transferable to the former Central and Eastern Blocs).

⁷² *Bulgaria Wary of Ethnic Strife: Socialists Ripped for Inciting Hostility Toward Turks*, SAN DIEGO UNION-TRIB., Nov. 4, 1991, at A5 (quoting statement of Bulgarian President Zhelyu Zhelev).

⁷³ Starets, *supra* note 8, at 2.

⁷⁴ See Zoltan Barany, *Grim Realities in Eastern Europe*, *TRANSITION*, Mar. 29, 1995, at 7, 7.

⁷⁵ See Raymond Shonholtz, *Strengthening Transitional Democracies Through Conflict Resolution: Conflict Resolution Education, Training, and Global Development*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, July 1997, at 9, 9 (stating that under socialism,

meant "saying no, disobeying laws . . . and going to jail."⁷⁶ Essentially, dissidents were "uncompromising absolutists."⁷⁷ In contrast, life under a democracy requires the art of compromise through negotiation⁷⁸ and finding ways to recruit people to one's cause, even if that means including their concerns with that cause.

For instance, the Solidarity Movement in Poland effectively utilized the technique of mass strikes in order to mobilize the people against socialism.⁷⁹ Yet once in power, Solidarity leaders experienced great difficulties in maintaining that public trust and negotiating in the daily routine of government.⁸⁰ Essentially, Solidarity won the battle for independence through uncompromising heroism yet lost the war through their inability and unwillingness to compromise in democracy.

Unlike the forced suppression of conflict under socialism, democracy views conflict as "one of its most constructive engines for organizing; unifying opinion; creating opposition; and expressing value, truth, and understanding."⁸¹ Rather than forced acceptance of the superiority of one particular view, (i.e., that of the party under socialism) democracy can be seen "as the development of the legitimacy of laws and the reasonableness of individuals" to understand that "several truths can exist

individuals were forced to wear an "emotional mask of passivity to avoid exposure to or confrontation with authoritarian agencies when experiencing disagreement with state decisions").

⁷⁶ Michael T. Kauffman, *From Dissidence to Dissonance*, TRANSITION, Feb. 21, 1997, at 5, 5 (describing how former dissidents under socialism lost their status in postrevolutionary society because of their inability to compromise and work collaboratively with others outside of an "underground" setting. Essentially, dissidents are often unable to thrive in democratic institutions and therefore have failed to maintain the support of the people.).

⁷⁷ *Id.*

⁷⁸ See Brazil, *supra* note 46, at B3 (recalling founder Raymond Shonholtz's statement that "[t]he deepest reality is that you can't run a democracy without negotiating"); see also Kauffman, *supra* note 76, at 5.

⁷⁹ See Brazil, *supra* note 46, at B3.

⁸⁰ See *id.*; see also Curry, *supra* note 9, at 74 (describing the fragmentation of the Solidarity party into numerous groups and the return of former communists to power in the elections of 1993).

⁸¹ Raymond Shonholtz, *The Mediating Future*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1997, at 139, 140 (advocating the creation of mediation modalities to transnational and multinational conflicts).

simultaneously.”⁸² Thus, in order to establish and maintain successful democracies, central and eastern Europeans must learn how to govern themselves using not only acquiescence and dissent, but compromise.

2. *Lack of Trust in Political Leaders of Central and Eastern Europe*

Unfortunately, ethnic conflict is not the only problem impeding central and eastern Europe’s transition from socialist to democratic institutions. Another problem in the current relationship between central and eastern European peoples and their governments is the extremely low public trust in political leaders. For example, according to a Czech political advisor, the Czech people have lost faith in their leaders and are “somewhere between cynicism and despair, [and] no one has support to do anything”⁸³ This lack of public support endangers the postsocialist legal institutions because “the success of any legal renewal . . . can be guaranteed only by full social and political support.”⁸⁴ The pressing question is how the legal system can gain the trust of the people in such a volatile and complex situation.

One way to gain this trust is to change the current anti-authoritative culture. Biologist Mary Clark has said that to change a political and social culture, society must do what we are biologically designed to do best, talk and listen.⁸⁵ According to her, our brains “work best when we engage in conversation,” and merely listening to political speeches “is no substitute for face-to-face conversation.”⁸⁶ Therefore, in order to change the worldview of the people of central and eastern Europe from the well-known and familiar one of cynicism and despair under communism, they must engage in group discussions at all levels.

⁸² Dusan Ondrusek, *Conflicts in Transforming Society and the Nongovernmental Sector: The Slovak Example*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1997, at 40, 41 (positing that open dialog about these differing truths is necessary to the continuance of democracy).

⁸³ Lipp, *supra* note 9, ¶ 17.

⁸⁴ Varga, *supra* note 27, at 494.

⁸⁵ See Clark, *supra* note 22, at 53.

⁸⁶ *Id.*

3. *Mediation Can Help Reduce Ethnic Strife and Ease Participants Through Political and Social Transition*

Unlike litigation, with its emphasis on legal discussions among lawyers, mediation generally requires parties to interact with each other face-to-face, and in so doing, essentially obligates each to treat the other with respect and dignity. According to one scholar, mediation assists parties to develop "a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."⁸⁷ Conflict becomes an opportunity for creative solutions in mediation by challenging participants to expand their problem-solving skills, form new methods of interacting with each other, and discuss difficult and often painful issues with the idea that mediation is an opportunity to improve current conditions.⁸⁸

The benefits of such face-to-face mediation sessions in central and eastern Europe are substantial. By talking with one another face-to-face in these sessions, mediators can help parties understand each other's perspectives and encourage them to find solutions that both sides can embrace. Essentially, mediation could enable parties of different ethnic backgrounds to come to terms with past conflict and to learn how to live together peacefully, one person at a time. As a prerequisite to these resolutions, each side could participate in a "recognition of injustices and resulting historic wounds, and acceptance of moral responsibility where due."⁸⁹ According to one scholar, this airing of past injustices is crucial to resolving ethnic strife and can be facilitated most successfully by mediators.⁹⁰

In addition to helping resolve ethnic conflicts, mediation can help establish a baseline of trust between the governments and the people by holding group discussions at all levels of government. This group discussion is essential to the survival of the newly formed governments, yet it must be organized and, at the very least, have governmental approval. For example, Perestroika attempted to open up channels of communication

⁸⁷ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

⁸⁸ See MARK ANSTEY, *PRACTICAL PEACE-MAKING: A MEDIATOR'S HANDBOOK* 17 (1993).

⁸⁹ Joseph V. Montville, *The Healing Function in Political Conflict Resolution*, in *CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION*, *supra* note 22, at 112.

⁹⁰ See *id.* at 113.

between the people and the Communist party in the former Union of Soviet Socialist Republic (U.S.S.R.).⁹¹ Unfortunately, Gorbachev failed to provide for appropriate forums in which these communications safely could take place and did nothing to change the dearth of experience or education in open and public discussion.⁹² Fundamentally, the U.S.S.R. had no "structures, no culture, no attitudes or [no] techniques for dealing with the free discussion" generated by the lifting of restrictions on speech.⁹³ According to one observer, Perestroika failed and the Soviet Union collapsed due to this inability of the people effectively to communicate their concerns to the government.⁹⁴

Central and eastern Europe reflected this lack of "a public space for dialogue between citizens and between the citizens and the government."⁹⁵ In order to forestall a collapse of central and eastern European democracies, these countries should encourage and organize mediators to hold public fora for the benefit of both government and the people. In these meetings, citizens could explain what they wanted in a democracy, while government officials could respond by explaining what they thought was possible. The mediator could be able to translate demands from either side into understandable language that facilitated settlement of the issues.

In Hungary, psychologists are in an excellent position to provide these mediation services. This is because under socialism, only psychiatric hospitals experimented with open group meetings as a type of self-help mechanism to improve patient health. Psychologists found that these open meetings between staff and patients actually improved patient mental health in that it allowed patients to talk openly about their concerns for the first time in their public lives. Essentially, patients were being trained in the art of conflict resolution. After the fall of socialism, Hungarian psychologists have gravitated towards the public sector to teach these skills learned in the group meetings. These include "ways to communicate effectively, accept feedback, recognize the positive potentials of conflict, work with small groups and communities, represent participants' interests, create clear contracts, and develop realistic expectations and shared responsibility in decision making."⁹⁶

⁹¹ See Brazil, *supra* note 46, at B3.

⁹² See *id.*

⁹³ *Id.*

⁹⁴ See *id.*

⁹⁵ Göncz & Geskó, *supra* note 38, at 30 (noting that Hungarians under socialism were unable to express their opinions openly for fear of government retaliation).

⁹⁶ *Id.* at 31.

For these forums to be effective, both the public and the government need to be trained in dispute resolution techniques. In addition to the skills listed above, the techniques would include individual education in active listening skills, and group training in "consensus decision making, . . . team building, and generating problem resolution options through brainstorming" ⁹⁷ These role-plays will force participants to re-examine communication styles and choose among those best suited to functioning in a democracy.

Essentially, central and eastern Europeans need experience in negotiation and compromise in order to maintain their democracies and can achieve a certain level of comfort in these processes through public forums designed to facilitate open and constructive communication. One scholar has posited that the use of conflict resolution in public fora can "assist in analyzing dysfunctional or nonfunctional institutions and policies . . . and facilitate the envisioning of acceptable alternatives for organizing new structures." ⁹⁸ The forums will help all sides to learn that democracy requires that both the government and the people take responsibility for maintaining these open channels of communication.

V. SHOULD MEDIATION PROGRAMS BE IMPLEMENTED THROUGH THE LEGAL SYSTEM OR THROUGH PRIVATE ENTITIES?

The benefits of fashioning one's own creative solution with the aid of a neutral third party may cause unanticipated problems in postsocialist countries. For example, the very informality that makes mediation efficient may have special problems in central and eastern Europe. According to a Hungarian scholar, socialist societies relied on the formal procedures of the legal system almost exclusively and considered the informality inherent in alternative dispute processes to be "a menace to the rule of law." ⁹⁹ This identification of "lay justice" ¹⁰⁰ with corruption presents a formidable

⁹⁷ CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* 126 (1996) (describing techniques involving ADR in preventing disputes at the individual, group, corporate, community, and national levels).

⁹⁸ Shapiro, *supra* note 49, at 25 (arguing that conflict resolution can complement modernization efforts in central and eastern Europe).

⁹⁹ Sajo, *supra* note 12, at 300 (noting that under socialism there was an automatic denial of informal methods).

¹⁰⁰ *Id.*

barrier to widespread acceptance of informal procedures such as mediation, particularly if mediation is viewed as a circumvention of the legal system.

In addition, the pressing lack of trust the public feels toward central and eastern European governments makes it an imperative goal for governmental action to become trustworthy. According to Judge Wayne Brazil, a high-quality court mediation program "increases the public's confidence in and respect for our system of justice and, by giving the parties a service they really value, increases their sense of gratitude toward the government and their sense of connection to our society."¹⁰¹ This gratitude, in turn, helps the public accept "the legitimacy of having democratically developed norms govern relations within our country."¹⁰² Indeed, Judge Brazil posits that "over time, in a democracy, the people will comply only if they trust and respect the courts as institutions."¹⁰³

Unfortunately, the people of central and eastern Europe may perceive the legal system as too corrupt for any court mediation program connected with it to be impartial.¹⁰⁴ For instance, the former republics of the U.S.S.R. and certain African nations have largely rejected court-sponsored mediation and "are building mediating processes in places where there is no respect for the formal institutional structure."¹⁰⁵ Although the legal systems there might benefit from a successful design, the odor of past injustices and present incompetence may cling too strongly to allow any mediation program to succeed.

As analyzed earlier, the people also view the central and eastern European governments with mistrust. Consequently, any successful mediation design should not be wholly implemented by either the legal system or the government. Yet, unlike the scarcity of court programs, several governmental mediation efforts are currently in place in these countries. Given the existence of several university-based mediation programs throughout central and eastern Europe, I believe that the optimal design would be a blend of government, academic, and community involvement.

For example, dispute resolution governmental agencies could work in tandem with the university-based conflict resolution centers. Experimental

¹⁰¹ Brazil, *supra* note 1, at 738 (arguing that a high-quality court mediation program with paid court mediators is the most effective model for courts).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Interview with Josh Stulberg, Professor of Law, The Ohio State University College of Law, in Columbus, Ohio (Mar. 18, 1999).

¹⁰⁵ Shonholtz, *supra* note 81, at 142.

pilot projects could be established in areas of conflict resolution education and training and the facilitation and mediation of ethnic conflict. University neutrals could educate their governmental counterparts in conflict resolution education, and both groups could provide similar educational seminars to local communities. The governmental agency would work in a similar fashion to those located in the United States and act as a clearinghouse for information and expertise.

In addition to a governmental agency, panels could be founded throughout the countries in various population centers. These would be composed of a governmental mediator, an academic mediator, and a mediator chosen from the local community. This three-part panel would help offset inherent skepticism of governmental manipulation and simultaneously increase involvement at the community level. The panel would be empowered to facilitate and mediate local disputes, and could act as a resource for individual education and training. In addition to covering local disputes these panels could facilitate governmental meetings at all levels of government. Finally, these panels also could be responsible for facilitation and mediation of ethnic disputes on an as needed basis, so that disputants could have a neutral forum in which to air their grievances before those grievances become violent. Essentially, this design will enable participants to improve their ability to communicate constructively and creatively in the midst of conflict. In short, the design has the potential for reducing ethnic strife within the central and eastern European countries, as well as shoring up emerging democracies by teaching citizens communication skills necessary in any successful democracy.¹⁰⁶

VI. CONCLUSION

The emerging postsocialist legal institutions of central and eastern Europe do not currently embody the democratic ideals of procedural equity and substantive fairness. Both the judiciary and political leaders have been compromised by their respective pasts under socialism and as a result are not trusted by the populace. In addition, ethnic conflict throughout central and eastern Europe has risen to unmanageable proportions and threatens to derail the transformation from socialism to democracy. Therefore, in order to prevent their newly formed governments from disintegrating into some form of authoritative structure, central and eastern Europe must find ways

¹⁰⁶ For more analysis and a description of these pilot projects, see generally Emily Stewart Haynes, *Designing a Dispute Resolution System for Central and Eastern Europe (CEE)* (1998) (unpublished manuscript, on file with author).

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to educate their people about democracy and revitalize their legal system. Essentially, this revitalization is necessary so that the principle of self-governance can be embraced throughout all levels of social and political life.

Mediation can play an essential role in this educational process. By structuring a neutral setting in which parties can creatively resolve their own disputes, mediation can demonstrate through example the values of democracy and responsible decisionmaking. Mediation also can be used as a means of eliciting public opinion regarding governmental policies and programs. As evidenced in Part III of this Note, central and eastern European governments currently utilize mediation in a variety of disputes. Several countries also have established connections with foreign mediators and permit education on mediation at the university level. Although relatively sparse, these examples show that central and eastern European countries have, to some extent, realized the benefits of mediation. Given the ability of mediation to address pressing social and political problems in the transformation from socialism to democracy, these governments should establish mediation programs that reach all levels of the populations. These programs should perform a variety of culturally sensitive processes that educate both the people and government in skills basic to any flourishing democracy—cooperation and compromise.

